

ANALYSIS



Some Reflections on Hong Kong's Autonomy

Introduction

The concept of autonomy is acquiring increasing importance in international and comparative public law in the late 20th century.¹ In Hong Kong, this concept was the subject of continuous public concern, discussion, and debate since the early 1980s. The issue was first raised during the Sino-British negotiation on the post-1997 constitutional status of Hong Kong in connection with the Chinese government's proposal for a future Hong Kong under Chinese sovereignty but exercising a 'high degree of autonomy' with 'Hong Kong people ruling Hong Kong.' The conclusion of the negotiation saw the autonomy of post-1997 Hong Kong as a Special Administrative Region of the People's Republic of China ('PRC') being guaranteed at the international law level by the Sino-British Joint Declaration on the Question of Hong Kong (1984). The Basic Law of the Hong Kong Special Administrative Region ('HKSAR'), enacted by the National People's Congress in 1990, further codified the concept as part of the post-1997 domestic law of the PRC and of Hong Kong.

However, the precise meaning and content of such autonomy have never been settled, with an apparently significant gap between the views, assumptions, and presuppositions of Chinese government leaders on the one hand, and Hong Kong politicians and public opinion on the other. The gap seemed to have been widened by the Tiananmen incident of 4 June 1989, in the aftermath of which Hong Kong has been perceived by the Chinese authorities as a potential base for subversion of the mainland government.² The mistrust, hostility, and deadlock arising from Governor Patten's October 1992 proposal for constitutional reform³ testified to this sharp divergence of understanding. This comment attempts to set out some of my own reflections about the concept of autonomy and its application to the question of Hong Kong in the light of such historical experience.

¹ See generally Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990). For an analysis of the theory of autonomy propounded in this book and its possible relevance to the case of Hong Kong, see Roda Mushkat, 'Hong Kong's Quest for Autonomy: A Theoretical Reinforcement' in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), ch 11.

² See Tsim Tak-lung, 'The Implementation of the Sino-British Joint Declaration' in Richard Y C Wong and Joseph Y S Cheng (eds), *The Other Hong Kong Report 1990* (Hong Kong: Chinese University Press, 1990), p 131, especially pp 139–45; Joseph Y S Cheng, 'Introduction' in Joseph Y S Cheng and Paul C K Kwong (eds), *The Other Hong Kong Report 1992* (Hong Kong: Chinese University Press, 1992), p xix, and especially pp xx–xxiv.

³ The proposals were published in *Our Next Five Years: The Agenda for Hong Kong* (address by the Governor, Mr Christopher Patten, at the opening of the 1992/93 session of the Legislative Council on 7 October 1992) (Hong Kong: Government Printer, 1992).

The concept of autonomy

The concept of autonomy⁴ as used in modern political science refers to a particular mode of distribution of governmental power within a sovereign state. Suppose there is a sovereign state X, and a part of its territory is Y. The population of Y can be said to exercise a power of autonomy within the state X if, acting through their representatives, they are empowered to govern themselves in respect of certain public affairs (such as housing, education, transport, social welfare, environmental hygiene, medical services, taxation, etc). The more extensive the kinds of affairs over which they are self-governing, the higher is their degree of autonomy.

In such a political arrangement, there will be at least two kinds of government in state X. The first is the national or central government of state X, representing and having authority over all the citizens of X. Second, there is a local government of area Y, representing and having authority over the population of Y. There exists a division of governmental powers between the two levels of government. The division is based on the classification of governmental affairs into different types, and the allocation of power over certain types of affairs to one government, and of power over other types of affairs to the other. The more extensive the powers of the local government, the higher is the degree of autonomy.

Formal and substantive autonomy

On a superficial analysis, the degree of autonomy of region Y within state X would depend solely on how governmental powers over different types of affairs relating to the population of Y are divided between the regional government of Y and the central government of X. But this would ignore a crucial factor, namely, whether the regional government of Y can genuinely represent the interests of the population of Y. In other words, if the regional government of Y is merely a puppet of the central government, then it is unlikely that there will be a genuine, substantive, and full exercise of the autonomous powers allocated to Y. In such a situation, there is only autonomy in form (formal autonomy), and no autonomy in substance (substantive autonomy).

From this point of view, the quest for the democratisation of Hong Kong⁵ may be understood as an attempt to realise the high degree of autonomy

⁴ A leading text on this subject is Yoram Dinstein (ed), *Models of Autonomy* (New Brunswick: Transaction Books, 1981), particularly the chapter by Hurst Hannum and Richard B Lillich, 'The Concept of Autonomy in International Law' at pp 215-54 of the book. See also Yash Ghai, 'A Comparative Perspective' in Peter Wesley-Smith (ed), *Hong Kong's Basic Law: Problems & Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990), pp 7-8.

⁵ For the history of Hong Kong's democratisation since the early 1980s, see generally Norman Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 5th ed 1991), especially ch 2; Norman Miners, 'Moves Towards Representative Government 1984-88' in Kathleen Cheek-Milby and Miron Mushkat (eds), *Hong Kong: The Challenge of Transformation* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1989), p 19; Ming K Chan, 'Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90' in Ming K Chan and David J Clark

promised for Hong Kong under the Joint Declaration and the Basic Law (from the point of view of formal autonomy, the promised autonomy is indeed very high, as may be deduced by compiling a long list of the various kinds of governmental affairs which fall within the jurisdiction of the SAR government).⁶ In this regard, the argument of the democrats (or liberals) in Hong Kong's political scene since the mid-1980s⁷ has been consistent and logically sound: without a democratically elected government representing the interests of the people of Hong Kong and fully accountable to them, it is simply impossible for Hong Kong to practise autonomy as a region within the People's Republic of China after 1997.⁸

Legalistic and informal autonomy

Apart from the distinction between formal and substantive autonomy, another useful distinction is between what I would call 'legalistic autonomy' (autonomy fully guaranteed by law and safeguarded by independent judicial institutions) and 'informal autonomy' (autonomy based on conventions, practices, common interests, mutual respect, understanding, discussion, and compromises). In the model of legalistic autonomy, not only are the powers of the regional government and central government carefully set out in legal provisions, but any dispute between the two governments regarding whether any particular act of one of them is contrary to the autonomy law (in the case of the HKSAR, the Basic Law) will be referred to and resolved by an independent judicial tribunal in an impartial manner by an objective and fair interpretation and application

(eds), *The Hong Kong Basic Law: Blueprint for 'Stability and Prosperity' under Chinese Sovereignty?* (Hong Kong: Hong Kong University Press, 1991), p 3; Albert H Y Chen, 'From Colony to Special Administrative Region: Hong Kong's Constitutional Journey' in Raymond Wacks (ed), *The Future of the Law in Hong Kong* (Hong Kong: Oxford University Press, 1989), ch 3. For more recent developments, see Johannes M M Chan, 'Constitutional Development in Hong Kong 1989-1993' in Albert P Blaustein (ed), *Constitutions of Dependencies and Special Sovereignities* [United Kingdom — British Dependent Territories — Hong Kong — Booklet 4] (Dobbs Ferry, New York: Oceana Publications, 1993). For an analysis from the socio-political point of view, see Lau Siu-kai, *Hong Kong Politics in the Transitional Period* (Hong Kong: Wide Angle Press, 1993) (in Chinese). For a brief summary from the Hong Kong government's point of view, see *Representative Government in Hong Kong*, Hong Kong Government White Paper, February 1994 (Hong Kong: Government Printing Department, 1994), especially part I thereof.

⁶ The point that the range of subject-matters over which the future HKSAR may exercise autonomy in accordance with the Joint Declaration and the Basic Law is extremely wide is discussed in Ghai (note 4 above), p 9; Hannum (note 1 above), p 149; Albert H Y Chen, 'The Relationship between the Central Government and the SAR' in Peter Wesley-Smith and Albert H Y Chen (eds), *The Basic Law and Hong Kong's Future* (Singapore: Butterworths, 1988), ch 7, pp 114-16. For a similar point made from a PRC perspective, see Wang Shuwen, 'The Basic Law is a National Law for Implementing the Policy of "One Country, Two Systems"' [1990] 2 *Studies in Law* 1, 7 (in Chinese) (Wang is a leading legal scholar in China and was a member of the Basic Law Drafting Committee).

⁷ See, eg, Martin C M Lee, 'How Much Autonomy?' in William McGurn (ed), *Basic Law, Basic Questions: The Debate Continues* (Hong Kong: Review Publishing Co Ltd, 1988), ch 2; Chan and Clark (note 5 above), pp 104-20 (texts of the speeches of Mr Martin Lee and Mr Szeto Wah at the Hong Kong Legislative Council debate on the first draft of the Basic Law on 14 July 1988).

⁸ It may be noted that in arrangements for autonomy in other parts of the world, the general practice is that the chief executive and legislature of the autonomous region are elected by the people of the region. See Hannum and Lillich (note 4 above), pp 234, 250; S A de Smith, *The New Commonwealth and its Constitutions* (London: Steven & Sons, 1964), p 57; Hannum (note 1 above), p 467.

of the autonomy law.⁹ Thus if the regional government makes a policy decision or law which the central government wants to revoke on the ground that it is beyond the lawful scope of the region's autonomy, the regional government need not submit to the will of the central government unless and until the independent tribunal decides the case against the regional government. In this legalistic model, the law as administered by a neutral and impartial body is supreme, and it cannot be said that the central government is 'above' or 'higher than' the regional government, because both are equally subject to the law.¹⁰

In the model of 'informal autonomy,' the regional government in a situation of dispute like that mentioned above cannot insist on its rights and resort to judicial or litigation proceedings for the purpose of protecting such rights. In theory the difference of opinion or conflicting interests will be settled by amicable negotiation between the central government and the regional government. In practice, the final outcome of the dispute will depend very much on the interests involved, the perception of the parties, the principles and public opinion which may be invoked, the negotiation strategies adopted by them, and, in the final analysis, on the relative power positions and bargaining capacity as between the two governments.¹¹

Applying these concepts to the Hong Kong situation, the existing de facto autonomy which Hong Kong enjoys under British rule is informal rather than legalistic in nature.¹² The position of the HKSAR under the Basic Law will still be largely informal, although there is a relative increase in the degree of express legal regulation.¹³ The degree of legal autonomy provided for in the Basic Law may be established by studying its provisions regarding the power of the NPC Standing Committee to revoke Hong Kong legislation¹⁴ and to apply PRC

⁹ The prime example in this regard is the federal supreme court which is responsible for arbitrating disputes between the federal government and the government of a member state of the federal state concerning their respective scopes of power. See Chen (note 6 above), pp 111–13; K C Wheare, *Federal Government* (London: Oxford University Press, 4th ed 1963).

¹⁰ See generally R E Johnston, *The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States* (Baton Rouge: Louisiana State University Press, 1969); M Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: The Bobbs-Merrill Co Inc, 1971).

¹¹ For further discussion of this model of autonomy and its possible relevance to the case of Hong Kong, see Chen (note 6 above), pp 135–6.

¹² W S Clarke, 'The Constitution of Hong Kong and 1997' in Y C Jao et al (eds), *Hong Kong and 1997: Strategies for the Future* (Hong Kong: Centre of Asian Studies, University of Hong Kong, 1985), ch 11 (describing Hong Kong's current position as 'tutelage on paper, autonomy in practice'); Miners (note 5 above), ch 16; Chen (note 5 above), pp 77–9 (on the general position in British colonies) and 113–115 (comparing the present position with the position of the HKSAR under the Basic Law as far as 'the autonomy of the Hong Kong system vis-à-vis the authority of London or Beijing' is concerned).

¹³ For analysis of the autonomy of the HKSAR under the Basic Law and limitations thereon, see generally Yash Ghai, 'The Past and the Future of Hong Kong's Constitution' [1991] *China Quarterly* 794, 806–11; Ghai (note 4 above), pp 9–21; Roda Mushkat, 'Hong Kong as an International Legal Person' (1992) 6 *Emory International Law Review* 106, 126–43; David J Clark, 'The Basic Law — One Document, Two Systems' in Chan and Clark (note 5 above), ch 2, pp 41–5; Hsin-chi Kuan, *Hong Kong After the Basic Law* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, Reprint Series No 8, 1991), pp 6–9.

¹⁴ Basic Law (BL), Art 17.

national laws to Hong Kong,¹⁵ and regarding the interpretation¹⁶ and amendment¹⁷ of the Basic Law. It should also be noted that there are no institutional mechanisms to enable the Chief Executive of the SAR to challenge the validity of orders or directions issued to him by the PRC State Council even where there are grounds to suspect that such orders or directions may violate the autonomy granted to the SAR by the Basic Law.¹⁸

Capacity and decision-making autonomy

The third set of contrasting ideas about autonomy I want to introduce here is autonomy in terms of capacity or competence to perform certain acts on the one hand, and autonomy in decision-making or policy-making regarding whether to perform the acts on the other.¹⁹ This distinction will become crucial in determining how much autonomy the HKSAR will enjoy in conducting 'non-political' external relations²⁰ with other countries and international organisations. Both the Joint Declaration²¹ and the Basic Law²² provide that the HKSAR may, using the name of 'Hong Kong, China,' enter into international agreements on economic, transport, communication, cultural, and other matters and participate in international organisations. It is therefore clear that the HKSAR has the formal capacity or competence (what I call 'capacity autonomy') to perform such activities in the international arena. However, what is not clear is whether, in respect of each transaction involving such international participation, the SAR government must consult the central government beforehand and obtain its approval before signing the agreement concerned or sending representatives to the relevant international organisation. If such prior consultation and authorisation on a case-by-case basis is not necessary, then the HKSAR has decision-making autonomy in dealing with external affairs, and this scenario is obviously more convenient and preferable from Hong Kong's point of view.

Autonomy as 'a separate system' and autonomy as freedom

The original essence of autonomy as a political arrangement — again using the model of the autonomy of the people of Y within state X — is the freedom of the people of Y to make political decisions, public policies, and laws on matters within the scope of autonomy without interference by the central authority.

¹⁵ BL18.

¹⁶ BL158.

¹⁷ BL159.

¹⁸ BL48(8). This issue was discussed in Albert H Y Chen, *Law and Politics in Hong Kong* (Hong Kong: Wide Angle Press, 1990), pp 41–3 (in Chinese).

¹⁹ This issue was first raised in Albert H Y Chen, *Hong Kong's Legal System and the Basic Law* (Hong Kong: Wide Angle Press, 1986), pp 212–17 (in Chinese), and Roda Mushkat, 'Foreign, External, and Defence Affairs' in Wesley-Smith and Chen (note 6 above), ch 12, pp 263–4.

²⁰ See Mushkat, *ibid*, for analysis of the concepts of foreign affairs and external economic affairs.

²¹ Annex I, section XI of the Joint Declaration.

²² BL151, 152.

Ironically, when applied to the case of the HKSAR and linked to the implementation of the idea of 'one country, two systems,' this very nature of autonomy has been compromised.²³ Here I am referring to provisions in the Joint Declaration,²⁴ which are amplified in the Basic Law,²⁵ on the preservation in Hong Kong after 1997 of capitalism and the existing social system and way of life. In theory, the high degree of autonomy for the SAR should mean that the SAR's people and government can choose whether to practise capitalism or socialism. But such freedom of choice does not exist under the Basic Law. If this question appears too academic, consider Article 107 of the Basic Law, which requires the SAR to 'follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product,' or Article 108, which stresses the importance of a 'low tax policy.' It is not clear whether these are policy guidelines, only relevant in political debates, or strict legal provisions justiciable and enforceable in the courts of the SAR.²⁶ In any event, the point to be borne in mind is that there is an inherent tension in both the Joint Declaration and the Basic Law between autonomy as Hong Kong people's freedom to govern themselves on the one hand, and autonomy as an instrument to implement the policy of 'one country, two systems' (that is, the maintenance of the existing economic and social system in Hong Kong) on the other hand.

Autonomy before and after 1997

Since the transition period began in 1985 with the entry into force of the Joint Declaration, the PRC government has made various attempts²⁷ to influence policy decisions in Hong Kong on matters such as constitutional reforms²⁸ and the airport project.²⁹ Some observers are of the view that the Chinese government's behaviour has demonstrated that it does not respect Hong Kong's

²³ This issue has been discussed in Chen (note 18 above), pp 27–9; Ghai (note 13 above), pp 808–9; Ghai (note 4 above), p 10; Yash Ghai, 'The Constitutional Framework' in Peter Wesley-Smith, *Hong Kong's Transition: Problems & Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1993), p 22. For a detailed analysis, see Yash Ghai, 'The Rule of Law and Capitalism: Reflections on the Basic Law' in Wacks (note 1 above), ch 12.

²⁴ Joint Declaration, para 3(5); and its annex I, sections VI, VII, and X.

²⁵ See ch V, s 1 and ch VI of the Basic Law, particularly BL107, 108, 111, 115, 118, 123, 136.

²⁶ This issue was discussed in Chen (note 18 above), pp 29–31.

²⁷ See generally Miners, *Government and Politics* (note 5 above), ch 17; Ian Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Hong Kong: Oxford University Press, 1989), chs 1, 7.

²⁸ See generally Kuan Hsin-chi, 'Power Dependence and Democratic Transition: The Case of Hong Kong' [1991] *China Quarterly* 774; Albert H Y Chen, 'Implications for the Transition Period 1990–97' in Wesley-Smith (note 4 above), p 23; Ghai, 'The Constitutional Framework' (note 23 above); and the works cited in note 5 above.

²⁹ This led to the conclusion between the UK and PRC governments of the Memorandum of Understanding Concerning the Construction of the New Airport in Hong Kong and Related Questions in September 1991. For the background to this agreement and the issues at stake, see Margaret Ng, 'The Implementation of the Sino-British Joint Declaration' in Sung Yun-wing and Lee Ming-kwan (eds), *The Other Hong Kong Report 1991* (Hong Kong: Chinese University Press, 1991), ch 5 (the text of the agreement has been reproduced as an appendix to this chapter of the book).

autonomy even before 1997, and therefore the prospects of the HKSAR's autonomy after 1997 are correspondingly diminished.³⁰ This inference about the Chinese approach to Hong Kong's autonomy after 1997 on the basis of pre-1997 events may not be completely fair and justified. For the truth seems to be that the Chinese government³¹ has never recognised that Hong Kong as a British colony is an autonomous political entity under the UK. The Governor as the chief executive of the Hong Kong government is appointed by the British government and is fully accountable to it and subject to any of its instructions, directions, or orders. Even the legislature of Hong Kong, from the perspective of the Chinese government, is an institution set up under a colonial constitution which the PRC does not recognise. From China's point of view, Hong Kong before 1997 does not have autonomy and there is therefore no question of respecting its autonomy so as to set a precedent for the post-1997 era. Furthermore, China is suspicious about any British conspiracy to jeopardise the long-term (post-1997) interest of Hong Kong or perpetuate British political influence in Hong Kong after 1997.³² This is at least a partial explanation for China's stance on political reform in Hong Kong and on financial commitments which endure beyond 1997.³³

Autonomy as perceived from outside

The final idea to be considered here is that the question of Hong Kong's autonomy is not just a matter of concern to the Chinese and British governments and the people of Hong Kong, but also to the international community, and such external perceptions regarding Hong Kong's autonomy will become increasingly important in the years ahead. Since 1986 Hong Kong has been a party to the General Agreement on Tariffs and Trade (GATT),³⁴ and it is currently participating as an entity separate from the UK in 29 international

³⁰ For discussion of this issue, see Ng, *ibid*; Peter Wesley-Smith, 'China and Hong Kong under the Basic Law: The Nominal and the Normative' (1992) 17 *Bulletin of the Australian Society of Legal Philosophy* 223; T S Lo, 'Interference post-1997?' *Window*, 5 February 1993, p 1.

³¹ For the perspective of the Chinese side, see generally Xin Weisi, *Political Commentaries by Xin Weisi* (Hong Kong: Ming Pao Publishers, 1987) (in Chinese); Gu Xinghui, *Gu Xinghui on Hong Kong* (Hong Kong: Mirror Cultural Enterprise, 1987) (in Chinese).

³² See generally Cheng (note 2 above); T S Lo, 'Hong Kong Diary,' *Window*, 22 January 1993, p 2; Zhou Nan, 'Zhou Nan Explains the Question of Hong Kong at the National People's Congress,' *Wen Wei Po*, 14 March 1994, p A3 (in Chinese).

³³ On 30 November 1992, when Sino-British relations deteriorated to their lowest point since the Joint Declaration of 1984 as a result of Governor Patten's political reform proposals, the Chinese government issued a statement to the effect that the pre-1997 British Hong Kong government had no authority, in the absence of consent on the part of the PRC government, to enter into any contract which purports to bind the HKSAR government after 1997. See *Wen Wei Po* (in Chinese) and *South China Morning Post*, 1 December 1992. For the text of a position paper of the Hong Kong Bar Association on this matter, see *Hong Kong Economic Times*, 23 December 1992, p 11 (in Chinese). For the view of a Hong Kong lawyer sympathetic to the Chinese government's point of view, see T S Lo, 'Contracts, leases and agreements,' *Window*, 5 February 1993.

³⁴ Roda Mushkat, 'The International Legal Status of Hong Kong under Post-transitional Rule' (1987) 10 *Houston Journal of International Law* 1, 3-4.

organisations.³⁵ The Joint Declaration³⁶ and the Basic Law³⁷ envisage that such international participation will continue, and that Hong Kong will continue to enjoy its own export quotas and tariff preferences from other countries. However, whether Hong Kong after 1997 will enjoy various privileges associated with a quasi-international legal personality does not solely depend on the unilateral desire of Hong Kong, China, or Britain — it also depends on whether other countries are willing to recognise Hong Kong's special status. This is why it is important not only for post-1997 Hong Kong to be autonomous, but also for post-1997 Hong Kong to be seen to be autonomous by the whole world.

The point is well illustrated by the United States-Hong Kong Policy Act passed by the US Congress in 1992.³⁸ The Act authorises the US government to treat Hong Kong (after 1997) 'as a territory which is fully autonomous from the PRC with respect to economic and trade matters.'³⁹ However if, at any time after 1997, the President 'determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China,' then Hong Kong will not be so treated.⁴⁰

Conclusion

This commentary has thus attempted to clarify several important ideas relating to Hong Kong's autonomy and the challenge of 1997. It is hoped that the grand project of 'a high degree of autonomy' and 'one country, two systems' can be realised, that the HKSAR's autonomy will be full, genuine, exercised in the interests of both mainland China and the people of Hong Kong, and accepted by the international community. As China continues to make progress in economic modernisation, which one hopes will also pave the way for political modernisation, the need to maintain two separate systems may gradually be diminished, and perhaps some day the idea of autonomy as 'a separate system' will evolve into autonomy as genuine freedom.

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³⁵ Kuan (note 13 above), p x (preface). See generally Brian Hook, 'The External Relations of Hong Kong' in Sung and Lee (note 29 above), ch 24.

³⁶ Joint Declaration, para 3(9), (10), and its annex I, s XI.

³⁷ Basic Law, chs V and VII.

³⁸ The Act was signed by President Bush on 5 October 1992. For US policy towards Hong Kong, see generally Gerald Segal, *The Fate of Hong Kong* (London: Simon & Schuster, 1993), ch 7; Jeff Muir, 'Americans in Hong Kong' in Sung and Lee (note 29 above), ch 6.

³⁹ Title I, s 103(3) of the Act. Examples of such economic and trade matters include import quotas and certificates of origin: see s 103(1).

⁴⁰ Title II, s 202(a) of the Act.

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